

11.2 Confidential - Coastal Kiosk Update

This report provides an update of the Maslin Beach Coastal Kiosk project.

This is an update on a previously reported project, concept or issue.

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Attachments: 1. Email from Craig Vozzo Fisher Jeffries (1 page)
2. Letter to Craig Vozzo Fisher Jeffries (2 pages)
3. Letter of advice from Norman Waterhouse (4 pages)

1 Executive Summary

1.1 Topic

This report seeks Council direction on the future process for the implementation of the coastal kiosk project at Maslin Beach.

1.2 Context

In December 2005 following an Expression of Interest process, Council endorsed applicants for the development and operation of coastal kiosks at Aldinga Beach South, Aldinga Beach North and Maslin Beach.

This report has been prepared in support of a separate non-confidential report on the development and operation of coastal kiosks.

Relevant documents were prepared and issued to the short-listed applicants on 22 July 2005 with submissions to be returned no later than 29 September 2005. At a meeting of the Coastal Kiosks Evaluation Committee on 17 November 2005, the Coastal Kiosks Evaluation Committee and design evaluation architect (under the supervision of a Probity Auditor and within the guidelines of the approved Evaluation Plan), endorsed and recommended to the (then) Commercial Enterprises Committee that, with a number of listed conditions, final applicants for each site be nominated. These were endorsed and approved on 13 December 2005 and the final applicants were formally advised immediately.

The successful applicant for the Maslin Beach site was a partnership comprising Ms Deb White and Mr Glen Robson.

1.3 Suggested Outcome

This report seeks endorsement of a revised process for the development and operation of a coastal kiosk and convenience store service at Maslin Beach.

2 Recommendation(s)

1. (a) **That under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**
 - o **The Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:**
 - **Section 90 (3)(b)(i)(ii) information the disclosure of which -**
 - (i) **could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and**
 - (ii) **would, on balance, be contrary to the public interest;**
- (c) **That accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.**
2. (a) **That a notice be served on Ms Robson advising it is Council's intention to withdraw from further negotiations with her and to revoke acceptance of the Robson tender unless documented evidence can be provided within a seven day period of her right and capacity to undertake the project and a willingness to accept the term of the lease offered by Council.**
 - (b) **That if the information requested in the Notice is not provided to us within the given time frame, that the endorsement of the Robson proposal for the development and operation of the Maslin Beach kiosk and convenience store service be withdrawn.**
 - (c) **That subject to the withdrawal of the endorsement of the Robson proposal a new Expression of Interest be called for the development and operation of a coastal kiosk and convenience store service at the nominated site at Maslin Beach.**
 - (d) **That following due diligence and probity audit process, the results of the Expression of Interest be recommended to Council for endorsement.**

3. That in the event that Ms Robson is able to provide the requested documented evidence and commitment to the term of the lease a report be presented to Council for consideration of whether it is willing to accept the changed arrangements with Ms Robson or alternatively to withdraw the endorsement of the Robson proposal for the development and operation of the Maslin Beach kiosk and convenience store service.
4. That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in 90(3)(a), 90(3)(b) until the position of Ms Robson to undertake the project is confirmed.

Key Factors

3 Discussion

3.1 Current Project Status

The Maslin Beach Kiosk and Convenience Store development was awarded to a partnership comprising Ms Deb White (later to become Deb Robson) and Mr Glen Robson in December 2005. Council staff since then have been working closely with the successful applicants and with State Government representatives (Department for Environment and Heritage, Coast Protection, Crown Solicitors) to ensure the proposal met legislative requirements and was approved to proceed to construction. Staff have assisted in resolving site and utility infrastructure issues and ensuring the development would be in sympathy with the proposed Coast Park design. There were also protracted negotiations with the Department for Environment and Heritage over the kiosk concept that significantly extended the timelines.

The project was submitted by the applicants to the Development Assessment Commission (DAC) and after minor design changes, was approved in October 2006. Following Building Rules certification, the project was then put to tender for construction. It is understood two building contractors provided tenders.

Notwithstanding the considerable effort of the Robson partnership and their design team and the apparent community support they were able to generate through their consultative approach with the local community and attention to sympathetic design the project although now at an advanced stage has not progressed further. This is purportedly due to the applicants disputing certain of the Lease Agreement Terms proposed by us. In addition during the lease negotiations it became evident to us that there had arisen a change to the partnership.

3.2 Lease Agreement Terms

The Lease Document and Memorandum were included in draft form in the original Expression of Interest documentation for information to the applicants. These documents need to be agreed and formally executed by the successful applicants and Council before construction can commence on site. We initially offered a lease period of twenty one (21) years however with legal advice, extended the lease with a right of renewal of twenty one (21) years. The Robson partnership has disputed the lease term proposed by us and have sought a further right of renewal period of twenty one (21) years. This is outside current Local Government Act provision and has not been agreed to by us. This issue has been argued through legal representation from both parties and has not yet been resolved. While not the only reason this is a significant factor in the development having stalled.

3.3 Variance from the original submission and partnership structure

Early in 2007, while waiting for relevant approvals for the kiosk development, the Robsons moved in to the Maslin Beach area and successfully applied for a licence to operate the existing General Store, earmarked by the owner for demolition to make way for new residential accommodation. The Robsons provided the usual store service supplemented by light café meals (by Mr Robson as chef) in a newly established indoor/outdoor dining area. This venture seemed to be operating successfully for a short time when suddenly in early May 2007, the store was closed and all fitments were removed. Following enquiries through the local community, it was intimated that the Robsons had separated. Further enquiries to their solicitors (Attachment 1) confirmed that the partnership had been dissolved and that Mr Robson was not contactable.

The Robson's solicitors also advised that the interest in the project had passed over to Ms Robson who they stated had every intention of completing the project. However Ms Robson has never formally advised Council of the changes to the partnership nor sought council consent to any assignment of the development rights solely to her.

Mr Robson and his broad catering and culinary experience and credentials were considered key elements in determining the successful selection of the Robson submission. Ms Robson has been requested through our solicitors on 4 July 2007 (Attachment 2) to provide documentation confirming that Mr Robson no longer has any interest in the project and details that would demonstrate her capacity to undertake the project; in particular, how she intended to operate the catering and culinary part of the business. The purpose of this request was to provide us with the necessary information that could assist us in reassessing whether there might be grounds for continuing to deal with Ms Robson. This information has not been provided to us to date.

3.4 Financial Capability

The financial capability and business statements produced by the Robsons at the evaluation stage of the project were deemed by the Assessment Panel to be satisfactory. With the change to the partnership, Mrs Robson was also requested (Attachment 2) to provide us with confirmation of her financial status and capability to develop and operate the proposed development particularly as the indicative cost of the project per tender call, including construction management and fitout costs, has escalated considerably. This confirmatory information has not been provided to us to date.

3.5 Where to from here

Negotiations to resolve lease terms have to date failed and confirmation of details of the changed partnership arrangement and capacity to deliver the project have not been forthcoming

Our solicitors have provided advice (Attachment 3) with respect to how we should respond to this changed circumstance. The advice states that given the lack of response to date by Ms Robson the two fundamental aspects of the tender submission from the Robson partnership which influenced the decision of Council to accept their tender have now changed, these being Mr Robson's restaurant and catering credentials and the financial capacity of the partnership to undertake the project. The solicitors advise that the change of either one of these tender conditions provides sufficient reason for Council to now withdraw from further negotiations with Ms Robson and to withdraw its acceptance of the original tender. However they also counsel a cautious approach given the potential for litigation and that a clear notice of Council's intention and its reasons that sets up the withdrawal should be communicated to Ms Robson rather than acting unilaterally.

Based on our legal advice it is proposed that the following process be undertaken so as to resolve the matter:

1. We issue notification through their legal representation that unless Ms Robson can provide documented evidence within a 7 day period of her right and capacity to undertake the project and a willingness to accept the commercial terms relating to term of the lease of the lease agreement for Council to consider how it might respond it is the intention of Council to withdraw from further negotiations with Ms Robson and will revoke its acceptance of the Robson tender.
2. In the event that Ms Robson is able to provide the requested documented evidence and commitment to the term of the lease a report be presented to Council for consideration of whether it is willing to accept the changed arrangements with Ms Robson.
3. That if the information is not provided to us within the given time frame for our consideration, that the endorsement of the Robson proposal for the development and operation of the Maslin Beach kiosk and convenience store service be withdrawn.

4. That if Ms Robson does not respond within the time-frame or that Council does not approve the changed arrangements a new Expression of Interest be called for the development and operation of a coastal kiosk/cafe and convenience store service at the nominated site at Maslin Beach.
5. That following due diligence and probity auditing processes, the results of the Expression of Interest be recommended directly to Council for endorsement.

